Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

JOSEPH J. WAYMIRE,

Petitioner,

versus

NORFOLK and WESTERN RAILWAY COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Can a regulation prescribed by the Secretary of Transportation pursuant to the Federal Railway Safety Act of 1970 ("FRSA"), 49 U.S.C. § 20101 - 21311, supersede existing Federal Law pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51-60, where the general authority granted to the Secretary is limited to regulations "supplementing laws and regulations in effect on October 16, 1970" 49 U.S.C §2013 (a)?

II. Are the FRSA state law preemption provisions of 49 U.S.C. §20106 and their stated goal of national uniformity limited to state laws and not intended to make FELA uniform with the various tort laws of the individual states?

III. Are the FRSA regulations at issue here in conflict with petitioners negligence claims?

PARTIES TO THE PROCEEDING

Petitioner

Joseph J. Waymire

Respondent

Norfolk and Western Railway Company. Effective September 1, 1998, Norfolk and Western Railway Company was merged into Norfolk Southern Railway Company, whose parent corporation is Norfolk Southern Corporation.

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The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 218 F.3d 773 (7th Cir. 2000). A copy of the Opinion is set forth in the Appendix hereto (App. 1a-9a). The Opinion of the District Court for the Southern District of Indiana is published at 65 F.Supp.2d 951(S.D. Ind. 1999) and is set forth in the Appendix hereto (App. 10a-25a).

JURISDICTION

The United States of Appeal for the Seventh Circuit issued its Opinion on July 14, 2000. This Petition for Writ of Certiorari is filed within 90 days of that date. Jurisdiction is invoked pursuant to 28 U.S.C. §1254(1) and 2106.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Federal Employers' Liability Act
45 U.S.C. §51

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats,

wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Federal Railway Safety Act of 1970
49 U.S.C. §20101. Purpose

The purpose of this chapter is to promote safety in every area of railroad operations and reduce railroad related accidents and incidents.

49 U.S.C. §20102. Definitions

In this part-

(1) "railroad"-

(A) means any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including -

(i) commuter or other shot-haul railroad passenger service in a mtropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but

(B) does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(2) "railroad carrier" means a person providing railroad transportation.

49 USC §20103. General Authority

A) Regulations and orders - The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970.

49 U.S.C. §20106. National Uniformity of Regulation

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the state requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order-

(1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce. (Added Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 866)

STATEMENT OF THE CASE

Summary of Facts:

Petitioner brought a cause of action against respondent pursuant to the Federal Employers' Liability Act ("FELA"), Title 45 U.S. §51 due to injuries he sustained on June 28, 1996. Petitioner was a conductor on one of respondent's trains en route from Fort Wayne, Indiana to Cincinnati, Ohio. (R.69: Index of Exhibits; Dep. of Joseph Waymire at p. 68). At the McGalliard Crossing in Muncie, Indiana, the train on which petitioner was riding collided with a truck which was trapped on the tracks because of traffic conditions. (R.69: Index of Exhibits; Dep. of John Wellbaum Vol. 1, at p. 22). The railroad crossing protection at the McGalliard Road included flashing lights and bells. (R.69: Dep. of Joseph Waymire at pp.127-28).

Prior to June 28, 1996, petitioner and other employees of respondent had experienced situations at McGalliard Crossing where street traffic was heavy and motor vehicles were trapped on the crossing as trains approached. (R.69: Dep. of Joseph Waymire at pp. 126-129; R.69: Dep of John Wellbaum, Vol. 2 at pp. 74, 76 78-79). Accident reports obtained from the Muncie Police Department indicate that between the years 1989 and 1995 there were four car-train accidents at the McGalliard Crossing. (R.69: Index of Exhibits, Exhibit 10, Muncie Police Department Accident Reports). In addition, incident reports from the Norfolk Southern Railway Police indicate that between April 4, 1993 and April 2, 1996 seven "near miss" incidences were reported to respondent where railroad trains came close to colliding with motor vehicles at the McGalliard Crossing (R. 69: Index of Exhibits, Exhibit 11, Norfolk Southern Police Reports.

Recognizing the traffic congestion at the McGalliard Crossing up until 1992, respondent had maintained a speed

limit of 10 mph for trains traveling over the McGalliard Crossing (R.69: Index of Exhibits, Dep. of Terry Boehm at p. 62). In 1992 the speed limit was raised to 25 mph for "efficiency". (R.69: Dep of Terry Boehm at pp. 62-63). A railroad trainmaster described "efficiency" as serving customers and saving on the economic costs of operating and maintaining a train. (R.69: Dep. of Terry Boehm at pp. 62-63)

Both petitioner and the engineer operating the train at the time of the collision testified that had the prior speed limit of 10 mph been in effect on the day of the alleged occurrence, the train would have been able to stop prior to colliding with the truck on the crossing (R.69: Index of Exhibits , Dep. of Gary Howe at pp. 36-38; Dep. of Joseph Waymire at pp. 113 and 138). This testimony was confirmed by respondent's Road Foreman of Engines who testified that when the speed limit was 10 mph it was easier to stop a train quickly than when the speed limit was 25 mph at McGalliard Crossing (R.69: Index of Exhibits, Dep. of John Onest at pp. 23-24). Moreover, the engineer involved in the alleged occurrence testified that he was involved in two train motor vehicle collisions at McGalliard Crossing prior to June 28, 1996. Both of these incidents occurred after respondent raised the train speed limit from 10 mph to 25 mph (R. 69:Dep. Of Gary Howe at pp. 9, 10 and 13).

Respondents Road Foreman testified that the Federal Railroad Administration ("FRA") had designated the track at McGalliard Crossing as Class 4 track because it is a mainline track. (R.69: Index of Exhibits, Dep. of John Onest at p. 19). This FRA classification concerns the maintenance requirements of the track and allows the railroad to operate trains at speeds of up to 60 mph, assuming the track is maintained at a certain standard. (R.69: Dep of John Onest at pp. 20-21)

Joseph Kostur, employed for over 30 years with the Illinois Department of Transportation is an expert in traffic/transportation cases as well as railroad crossing design. (R.69: Index of Exhibits, Exhibit 12, Affidavit of Joseph Kostur). Mr. Kostur has opined that respondent failed to use ordinary care in increasing the speed at the McGalliard Crossing from 10 to 25 mph (R.69: Affidavit of Joseph Kostur). In addition, Mr. Kostur has opined that the railroad should never have increased the speed limit at the McGalliard Crossing without the installation of crossing gate protection at this crossing. (R.69: Affidavit of Joseph Kostur).

James Arton is a retired Division Superintendent for Consolidated Rail Corporation. In his position Mr. Arton was responsible for safety and investigating railroad accidents and the causes of same. (R.69: Index of Exhibits, Exhibit 13, Affidavit of James Arton). He has stated that a railroad has a duty to its employees and the public to regulate the safe speed of their trains. Mr. Arton has attested that the FRA designation of class 4 track at the McGalliard Crossing primarily refers to the type of maintenance a railroad should provide track a certain location. (R.69: Affidavit of James Arton). With those maintenance requirements satisfied, the railroad is authorized to run trains on that track at speeds up to 60 mph, however, a railroad should use its discretion in establishing a safe speed limit. In Mr. Arton's opinion, the respondent's decision to increase the speed from 10 mph to 25 mph at the McGalliard Crossing created an unsafe condition for railroad employees and was a cause of the accident. (R.69: Affidavit of James Arton).

PROCEEDING BELOW

In addition to his FELA claim against respondent, petitioner brought a common law negligence claim against the truck owners and the truck driver, which has been settled and dismissed. Respondent filed a Motion for Summary

Judgment. Petitioner filed his response to the Motion for Summary Judgment along with his index of exhibits. (R. 69: Index of Exhibits). Despite the above stated facts the District Court issued its opinion and order granting respondent's Motion, and entered judgment in favor of respondent and against petitioner on all claims. The District Court held that because the train was traveling within the speed limits set by the FRSA and its regulations, petitioners unsafe speed claim pursuant to the FELA was superseded by the FRSA (App. 10a-25a). Similarly, the District Court ruled that petitioner's FELA claim asserted inadequate warning devices at the crossing in question was superseded by the FRSA and its applicable regulations. (App. 10a-25a).

On July 14, 2000, the United States Court of Appeals for the Seventh Circuit issued its decision affirming the District Court's decision in all respects. (App. 1a-9a). Relying on this Court's decisions in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, (1993) and *Norfolk Southern Railway Co. v. Shanklin*, 120 S.Ct. 1467, 146 L.Ed.2d 374 (2000), the Court of Appeals held that a FELA defendant could not be liable for speed and inadequate crossing protection claims where both the train speed and railroad crossing protection complied with the FRSA. For purposes of train speed and railroad crossing protection, the Court of Appeals held that petitioner's FELA claims were superseded by the FRSA (App. 1a-9a).

Petitioner has duly filed its petition for writ of certiorari within ninety days of the entry of this ruling.

REASONS FOR GRANTING THE WRIT

I. The Stated Purpose Of The FRSA And The Authority Of The Secretary Is Limited To Laws And Regulations Which **Supplement** Existing Federal Laws, Such As The FELA. This Issue Is A Question Of First Impression Before The Court.

Congress, by virtue of 49 U.S.C §20103-General Authority, did not authorize the Secretary of Transportation to prescribe laws which supersede other Federal rail safety statutes. The Secretary's authority is limited to "supplementing laws and regulations in effect on October 16, 1970". As such the FRSA regulations at issue here cannot and should not supersede petitioner's FELA claims.

Congress enacted the FELA in 1908 with a focus on reducing injuries and death resulting from accidents on interstate railroads. *Consolidated Rail Corp v. Gottshall*, 512 U.S. 532, 543 (1994). Recognizing the physical damages inherent in the operation of a railroad, Congress "crafted a federal remedy that shifted part of the "human overhead" of doing business from employees to their employers." *Id.* The FELA is a broad remedial statute which this Court has construed liberally in order to effectuate its purposes. Gottshall, 512 U.S. at 543. The FELA provides that railroads operating in interstate commerce:

> shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defeat or insufficiency, due to its negligence, in it cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other

equipment.

This Court has confirmed that Congress anticipated that a federal common law of rights and obligations under the FELA would develop and would effectuate the Act's remedial purposes enacted in large by Congress. "Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it is clear that the general congressional intent was to provide liberal recovery for injured workers." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958).

In 1970, Congress also passed the Federal Railroad Safety Act, 49 U.S.C. §20101 *et.seq*. ("FRSA") for purposes of promoting rail safety and reducing rail accidents. Moreover, under the FRSA, Congress gave the Secretary of Transportation the authority to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970." 49 U.S.C. §20103(a). The FELA and the federal common law decisions which accompany it were clearly established and "in effect on October 16, 1970". Nothing in the plain or implied language of the statute suggests that it was Congress' intent with the passage of the FRSA to impede or limit a railroad employees right to recover for on the job injuries pursuant to the FELA. As a result, the Secretary of Transportation had no authority to supersede or undermine the FELA and the federal common law of rights and obligations under this statute.

In *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) this Court explained that "the question whether a previously available common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress

addresses the problem governed by federal common law." *Id.* at 315. In determining whether a federal statute supersedes previously established federal common law this Court has reasoned that the relevant inquiry is "whether the statue '[speaks] directly to [the] question' otherwise answered by federal common law." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236-237, (1985). Here, the statute authorized only such laws and regulations which supplement the existing law.

Moreover, in *United States v. Texas* this Court stated:

> "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." In such cases, Congress does not write upon a clean slate. In order to abrogate a common law principle, the statute must "speak directly" to the question addressed by the common law.. . . [T]here is no support in our cases for the proposition that the presumption has no application to federal common law . . . "courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the contrary is evident.'"

Id. at 534 (citations omitted). The principles articulated in FELA appellate court decisions are merely extensions of the statutory remedy created by Congress for the benefit of railroad employees. Any fair reading of the FRSA clearly indicates that Congress did not intend by enactment of the FRSA, to abrogate or undermine the FELA plaintiffs ability to state a FELA cause of action sounding in negligence. Thus, there is no "statutory purpose to the contrary."

Clearly, the FRSA was passed by Congress with a full understanding of other rail safety laws, particularly Federal laws. Congress expressed its unambiguous intent in its grant of authority to the Secretary of Transportation. The Secretary could "supplement" existing law only. The FELA was and remains an existing law for rail workers.

This case permits this Court to clarify this issue of first impression and is of obvious and special importance to rail workers, their families and their employers, the nations' rail carriers. Since FRSA and FELA are both rail safety laws, this Courts review of the interaction between these laws has significant impact on the many FELA cases pending in the Courts of this country.

II. The FRSA State Law Preemption Provisions Of 49 U.S.C. §20106 And Their Stated Goal Of National Uniformity Are Limited To State Laws And Not Intended To Make FELA Uniform With The Various Tort Laws Of The Individual States.

In cases brought strictly under state law, this Court has found two areas, speed regulations and warning signs at grade crossings, where federal regulations pursuant to FRSA have "covered" the field such that any attempts at state regulation inconsistent with the federal regulations are preempted. Consequently, state negligence claims based on a train speed and inadequate crossing warning devices were preempted by the FRSA where the railroad had complied with the regulations enacted by the Secretary of Transportation. *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993); and *Norfolk Southern Railway Co. v. Shanklin*, 120 S.Ct. 1467, 146 L.Ed.2d 374 (2000).

In the instant case, the Court of Appeals, relying on this Courts decisions in *Easterwood* and *Shanklin*, reasoned

as to petitioner's excessive speed claim that it would "seem absurd to reach a contrary conclusion in this case. . . when the Supreme Court has already found that the conduct is not culpable negligence under state law." (App. at 5a). The Court of Appeals further determined that the petitioner's FELA claim asserting inadequate warning devices at the crossing was also superseded by the FRSA and its comprehensive regulations relating to warning devices at grade crossings. (App. at 7a). The Seventh Circuit concluded that to effectuate the goal of uniformity under the FRSA, the standard for train speed and warning devices at grade crossings should be the same for all plaintiffs regardless of whether his claim is pursuant to State law or the FELA. It also concluded that the regulations were in conflict with petitioner's negligence claims.

Petitioner would submit that the Court of Appeals interpretation of the FELA and the FRSA is inexcusably narrow. This is the first decision issued by a Court of Appeals wherein the FRSA precludes a plaintiff's FELA claim. Essentially, the Court of Appeals accepted Respondent's argument that the FRSA can supersede the FELA. There is no statutory authority, nor any controlling case law which supports the decision below.[1] Congress' stated purpose in enacting the FRSA was to promote safety in all areas of railroad operations and to reduce railroad accidents and injuries. The FRSA clearly indicates that the Secretary of Transportation shall prescribe regulations and issue orders for every area of railroad safety **supplementing**

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[1]As set forth in Seventh Circuit opinion, two other district courts have held that the FELA plaintiff's unsafe speed claim cannot stand in light of the Secretary's adoption of the speed regulations in 49 CFR §213. *See Rice. v. Cincinnati, New Orleans and Pacific Railway Company*, 955 F.Supp 739, (E.D.Ky 1997) and *Thirkill v. J.B. Hunt Transport, Inc.*, 950 F.Supp 1105 (N.D. Ala. 1996). One other court has reached the opposite result, *Earwood v. Norfolk Southern Railway Company*, 845 F.Supp 880 (N.D. Ga. 1993).

laws and regulations in effect on October 16, 1970. 49 U.S.C. §20103(A). The FELA had been in existence sixty two years in 1970. Nowhere does the FRSA state that it limits the ability of railroad employees to bring suit against their employers pursuant to the FELA. In *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), this Court held that the FRSA and regulations adopted pursuant to its authority "may preempt any **state** 'law, rule, regulation, order, or standard relating to railroad safety'." *Id.* (Emphasis added). In *Easterwood* this Court construed the FRSA in accordance with its specific language. The FRSA itself does not authorize preemption of other federal statutes, including the FELA.

Interestingly, §5 of the FELA states:

> Any contract, rule, *regulation*, or device, whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void.

Title 45 U.S.C. §55 (emphasis added). While this section typically deals with contracts requiring employees to waive their rights under the FELA, as with the other portions of the FELA, §5 should be liberally interpreted and may be instructive in this case.

In interpreting §5 of the FELA, this Court stated:

> The words "purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act" do not refer simply to an actual intent of the parties to circumvent the statute. The "purpose or intent" of the contracts and regulations, within the meaning of the section

> is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce.

Philadelphia, Baltimore & Washington R.R. v. Schubert, 224 U.S. 603, 612 (1912). Therefore, this Court held that §5 was entitled to a broad, generic interpretation in order to protect the remedies prescribed by the FELA.

In this case, the Court below read the purpose and intent of the FRSA regulations at issue as exempting respondent from FELA liability. Such a construction is contrary to the intent of §§1 and 5 of the FELA and in no way comports with the stated purpose of the FRSA, to promote safety in every area of railroad operations. Indeed, the Court of Appeals decision, if allowed to stand, will decrease a railroad's incentive to operate its trains at a safe speed or provide adequate and appropriate warning devices, given the known conditions of a particular crossing.

In enacting the FELA, it was the intention of Congress, by its legislation on the liability of railroads for injury to employees while engaged in interstate commerce, to take entire and exclusive control over this subject, with a view to making the liability in such employee cases uniform throughout the United States. *New York Central R.R. v. Winfield*, 244 U.S. 147 (1917). The purpose of the FELA is to enlarge the remedy of railroad employees injured as a result of the hazards incident to their work. The FELA provides a broad remedy for railroad workers who suffer personal injuries as a result of the negligence of their employer, and the coverage of the statute is defined in broad language which has been construed even more broadly. *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557 (1987).

It should be noted that in *Buell*, this Court held that

the possibility of pursuing a labor grievance under the Railway Labor Act ("RLA") did not deprive an employee of his right to bring a FELA action. Because the RLA provided a framework for labor disputes, whereas the FELA is a broad remedial statute for injured workers, and the RLA does not mention the FELA or deal with tort liability, it did not supersede the FELA. *Id.* at 562.

In *Sinkler v. Missouri Pacific R.R.*, 356 U.S. 326, this Court stated:

> [I]n interpreting the FELA, we need not depend upon common-law principles of liability. This statute, an avowed departure from the rules of common law, was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier."

Id. at 329-30 (citations omitted). Beyond the fact that a statutory action under the FELA significantly differs from a common law negligence action in terms of standard of proof, it is clear that the congressional intent in enacting the FELA was to secure jury determinations in a larger proportion of cases than would be true of ordinary common law actions. Thus, trial by jury is part of the remedy in FELA cases. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 360 (1962).

In keeping with the dictates of the Supreme Court, the FELA is to be liberally construed on behalf of injured workers. *Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108

(1963). Often the result is that recovery will be proper under the FELA when it would not be under the common law of negligence. *Ignacic v. Penn Central Transp. Co.*, 291 Pa. Super. 431, 435, 436 A.2d 192, 194 (Sup. Ct. 1981) (citing *Rodriguez v. Delray Connecting R.R.*, 473 F.2d 819 (6th Cir. 1973).

In affirming the District Court's decision to grant summary judgment in favor of respondent, the Court of Appeals stated: "To treat cases brought under federal law differently from cases brought under state law would defeat FRSA's goal of uniformity. It would deny recovery to the motorist struck by the train, but not to the engineer operating the train. We do not believe that this is the result envisioned by the statute or by the Supreme Court". (App. at 7a).

Petitioner would respectfully submit that the Seventh Circuit has misapplied the previous decisions of this Court which have held that FELA plaintiffs are treated differently under the law than common law plaintiffs. FELA plaintiffs are treated differently than common law plaintiffs in many ways, solely because they are protected by the FELA. Certainly, the truck driver herein, who was most likely covered by Workers' Compensation laws, would be entitled to a recovery from his employer if he was injured. Federal Courts have long recognized that state laws may bar a cause of action for common law plaintiffs, yet have no impact on railroad employees under the FELA. *See, Bridger v. Union Ry.*, 355 F.2d 382, 392 (6th Cir. 1966); *Cazad v. Chesapeake and O. Ry.*, 622 F.2d 72 (4th Cir. 1980).

Because the FELA is a work related compensation statute it was Congress' intent to provide broader protection for the FELA employee plaintiff than a typical common law plaintiff. It is well established that the quantum of evidence required to established liability in a FELA case is much less than in an ordinary common law negligence action. *Rogers.*

v. Missouri Pacific R. R., 352 U.S. 500 (1957). In order to further the FELA's humanitarian purposes, Congress did away with several common law tort defenses that might otherwise bar recovery by injured workers. Traditional common law doctrines of assumption of risk and contributory negligence as a complete defense were significantly modified. Title 45 U.S.C. §54 bars the assumption of risk defense and Title 45 U.S.C. §53 substitutes the concept of comparative negligence.

A further example of the way non-employee plaintiffs are treated differently than FELA employee plaintiffs is that a non-employee plaintiff, bringing suit against a railroad for a violation of the Federal Safety Appliance Act, would be restricted to a common law negligence action against the railroad. In such a common law action, the railroad would be permitted to allege the defenses of contributory negligence and assumption of risk. In a FELA action, the railroad would be deprived of such defenses. *Crane v. Cedar Rapids & Iowa City Ry.*, 395 U.S. 164, 166 (1969). In *Crane*, this Court was faced with the question of whether a state may make the defense of contributory negligence available to a railroad sued by a non-employee for personal injury damages caused by the railroad's violation of the Safety Appliance Act. In answering the question in the affirmative, this Court set out some of the statutory privileges enjoyed by the FELA plaintiff, in particular, the fact in a FELA cause of action, the railroad is deprived of the defenses of contributory negligence and assumption of risk. *Id.* at 166. Because the non-employee can only bring a common law action in tort, the availability of these defenses is left to state law. Id. The Court further stated:

> We recognize the injustice of denying recovery to a non-employee which would not be denied to an employee performing the same task in the same manner as did [the non-

> employee]. But it is for Congress to amend the statute to prevent such injustice. It is not permitted the Court to rewrite the statute.

Id.

Contrary to the dictates of *Crane*, the Court below has in effect rewritten the FELA. A FELA plaintiff's ability to recover against his employer is severely undermined by the Seventh Circuits decision to which completely ignores the disparate treatment which a FELA plaintiff is entitled. The opinion below has ignored the scope and intent of FELA and ruled that by complying with CFR regulations the railroad had fulfilled its obligation under the FELA to provide a reasonably safe place to work.

Nothing in 49 U.S.C §20106 and its references to national uniformity among the various States, or the plain language of either FELA and FRSA suggest that the FRSA can supersede petitioner's FELA claim.

III. The Enforcement Of Plaintiff's FELA Claims Would Enhance The Stated Safety Goals Of FRSA. Further, The FRSA Regulations At Issue Here Supplements FELA Provisions And Are Not In Conflict With It.

Curiously, the opinion below undermines safety and promotes rail crossing accidents. The FRSA determined that the track bed, rails and ties were in sufficiently good condition to permit trains operations at 60 mph. Here the train did not derail due to any condition of the track itself. In that sense, the Secretary was probably correct to determine that the track could accommodate 60 mph train speeds. Nevertheless, both the respondent railroad and the petitioner employee knew that rail operations at even half the permitted

speed was unsafe. The prior speed limit set by the railroad for this area was 10 mph.

Respondent's employees, who were familiar with the area, all felt that 10 mph was the maximum safe speed. Instead, respondent raised the speed limit to 25 mph to increase "efficiency". The rail crew and this respondent knew that at 25 mph, given the conditions, the train would be unable to stop in time for vehicles trapped on the crossing. Respondent knew that vehicles had been trapped on the crossing before due to the traffic light configuration. The issue of the railroad's negligence under the FELA is clearly presented. The decision below immunizes the railroads from the claims of its employees, even though respondent's conduct was negligent and increased the likelihood of accident and injury.

Most importantly, petitioner's FELA claims do not conflict with the railroad's obligations under the FRSA. The speed limit is a maximum. The regulations themselves are the minimum standards for safety. Yet the decision below turn these concepts on their head. Simply put, respondent was not compelled by FRSA regulations to proceed at 60 mph or 25 mph. It was free to choose its train speed provided it did not exceed 60 mph. With regard to the crossing protection, the FRSA merely required a minimum kind of grade crossing protection. Respondent was free to choose a higher kind of protection for its employees. Indeed, respondent could freely choose which course of conduct best suited its needs and the safety of its employees. For instance, it may decide that the hazard presented by this crossing would be alleviated by leaving the speed limit at 25 mph and upgrading the crossing protection in such a manner that vehicles are no longer trapped on the crossing by the nearby traffic signal. In the alternative, it could allow the crossing protection to remain but return to a speed limit which allows the train to safely stop upon observing a trapped vehicle.

Either choice would be far safer than the present situation, and such reasonable safety choices are the well recognized principles of an FELA negligence case. Contrary to the conclusion of the Court below, the FRSA regulations do not require a particular conduct by the respondent which is inconsistent with petitioner's allegations of negligence.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the decision of the United Stated Court of Appeals for the Seventh Circuit and, ultimately, to vacate and reverse the order below and remand the matter to the District Court for Trial.

Respectfully submitted,
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No. 99-2788

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOSEPH J. WAYMIRE,
Plaintiff-Appellant,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Defendant-Appellee.

February 18, 2000, Argued

July 14, 2000, Decided

OPINION:

Bauer, *Circuit Judge.*

Joseph Waymire, a conductor for the defendant Norfolk and Western Railway Company ("N&W"), sued his employer under the Federal Employers' Liability Act ("FELA"), *45 U.S.C. § 51 et seq.*, claiming that the post traumatic stress he suffered after a train/truck collision disabled him from continuing his employment. The District Court found that Waymire's FELA negligence claims were superseded by the Federal Railroad Safety Act ("FRSA"), *49 U.S.C. § 20101 et seq.*, and entered summary judgment in favor of N&W. Waymire appeals. We affirm.

I. BACKGROUND

On June 8, 1996, Waymire was the conductor on an N&W train that collided with a truck stopped on N&W's tracks at the McGalliard Road crossing in Muncie, Indiana. Waymire was not physically injured in the collision, but he claims that as a result of the accident he developed post traumatic stress syndrome and is completely disabled from employment. The driver of the truck suffered only scrapes and bruises.

Waymire sued N&W under FELA, claiming that the railroad company's negligence in allowing the train to travel at an unsafe speed and in failing to install additional warning devices at the crossing caused or contributed to cause the accident.[1] Just prior to the collision, the train was traveling 20 to 23 miles per hour, well below the 60 miles per hour speed limit set by FRSA and the regulations promulgated thereunder. Furthermore, at the time of the accident, the McGalliard Road crossing was equipped with federally funded, installed and approved warning devices, including cantilevered flashing warning signals that gave advance warning of an approaching train, pavement markings indicating the presence of railroad tracks, and a "DO NOT STOP ON TRACKS" sign that motorists had to pass before reaching the tracks.

Arguing that its compliance with FRSA precluded Waymire's negligence claims under FELA, N&W moved for summary judgment. The District Court considered the statutes and ruled that FRSA and regulations promulgated thereunder defeated plaintiff's allegations of unsafe train speed and inadequate warning devices in his FELA negligence action. We agree and affirm the District Court.

II. DISCUSSION

We review the District Court's grant of summary judgment *de novo*, drawing all reasonable inferences in favor of the non-movant, Waymire. *Williams v. National Railroad*

Passenger Corp., 161 F.3d 1059, 1061 (7th Cir. 1998). If we find there is no genuine issue of material fact and that N&W is entitled to judgment as a matter of law, we will affirm the District Court's judgment. Fed.R.Civ.P. 56. Here, there are no genuine issues of material fact and our inquiry focuses on the application of the law to the facts.

A. Unsafe Speed Claim

In 1908, Congress enacted the Federal Employers' Liability Act, *45 U.S.C. § 51,* et seq., to provide a remedy to railroad employees injured as a result of their employers' negligence. *Kossman v. Northeast Illinois Regional Commuter Railroad Corp., 211 F.3d 1031, 1035 (7th Cir. 2000).* FELA imposes on railroads "a general duty to provide a safe workplace," *McGinn v. Burlington Northern Railroad Company, 102 F.3d 295, 300 (7th Cir. 1996):* Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier . . . *45 U.S.C. § 51.*

As a general negligence statute, FELA neither prohibits nor requires specific conduct by a railroad. By contrast, the Federal Railroad Safety Act of 1970, *49 U.S.C. § 20101 et seq.,* proscribes railroad conduct by empowering the Secretary of Transportation to implement comprehensive and detailed railroad safety regulations. *49 U.S.C. § 20103* ("The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railway safety."). The question with which we are presented is whether a railroad company can be liable in a FELA negligence action claiming unsafe speed and inadequate warning devices when the complained of conduct complies with the conduct mandated by FRSA and its regulations. We hold that it cannot.

The vast majority of courts examining lawsuits arising out of automobile/train collisions do so under state law.[2] Thus, the courts employ a preemption analysis. We do not do so here, as we are instead faced with the interaction of two federal statutes. But, we find the opinion of the Supreme Court on the subject of the preemption of unsafe train speed claims to be instructive and so we discuss it here.

In *CSX Transportation, Inc. v. Easterwood, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993),* the widow of a truck driver killed in a crossing collision sued the railroad under Georgia law alleging that the railroad operated its train at an excessive speed and failed to maintain adequate warning devices at the crossing. The Court found that plaintiff's excessive speed claim was barred by FRSA's preemption clause, which provides that states may regulate railroad safety "until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." *49 U.S.C. § 20106* (emphasis added). The Secretary of Transportation has promulgated regulations under FRSA setting maximum train speeds for certain classes of railroad tracks, 49 C.F.R. § 213.9, and the defendant's train was traveling within that speed limit. Thus, Easterwood was not allowed to maintain her excessive speed claim.

In deciding whether the speed regulations "covered" the field, ensuring preemption, the Court noted that although they were written in terms of maximum speeds, the regulations were more than just ceilings, an argument also advocated by the plaintiff here. If they were merely ceilings, there arguably would be room for railroad liability if the plaintiff could show that conditions favored lower speeds. The Supreme Court rejected that argument, saying that the preemption clause does not require an inspection of the regulation's motivation, and, even if it did, the structure of the regulations showed that they were adopted with safety in mind. *Id. at 674.*

We are persuaded by the Supreme Court's reasoning and find that in order to uphold FRSA's goal of uniformity we must strike the same result. See *49 U.S.C. § 20106* ("Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable."). In *Easterwood,* the train was operating within the FRSA prescribed 60 miles per hour speed limit, as was N&W's train in this case. It would thus seem absurd to reach a contrary conclusion in this case when the operation of both trains was identical and when the Supreme Court has already found that the conduct is not culpable negligence.

We are not alone in our conclusion. Of the other courts who have been presented with the issue as it relates to FELA and FRSA, two have held that the FELA plaintiff's unsafe speed claim cannot stand in light of the Secretary's adoption of the speed regulations in 49 C.F.R. § 213. *See Rice v. Cincinnati, New Orleans & Pacific Railway Company, 955 F. Supp. 739, 740-41 (E.D. Ky. 1997)* and *Thirkill v. J.B. Hunt Transport, Inc., 950 F. Supp. 1105, 1107 (N.D. Ala. 1996).* Only one other court has reached the opposite result. *See Earwood v. Norfolk Southern Railway Company, 845 F. Supp. 880 (N.D. Ga. 1993).* We believe the former result to be the correct result in light of FRSA's goal of uniformity and the Supreme Court's holding in *Easterwood* and thus hold that Waymire's negligence claim based upon the speed of the train is superseded by FRSA and the regulations promulgated thereunder. The judgment of the District Court is affirmed in this regard.

B. Inadequate Warning Devices

We find that similar reasoning causes us to reject Waymire's FELA claim that N&W negligently failed to install additional warning devices at its crossing. The Secretary of Transportation has addressed crossing safety through a series of regulations and, for projects using federal funds, mandates that crossings involving multiple tracks,

high speed trains operating in areas of limited visibility, or having heavy vehicle or train traffic employ automatic gates with flashing signals. 23 C.F.R. § 646.214(b)(3). A "diagnostic team" made up of representatives of the interested parties can also recommend automatic gates and flashing signals be installed. *Id. See also* 23 C.F.R. § 646.204(g). For crossings not meeting these conditions, the Secretary of Transportation requires that the type of warning device be approved by the Federal Highway Administration ("FHWA").

The *Easterwood* court found that these regulations cover the subject matter of warning devices at grade crossings and displace state law. *507 U.S. at 670-71.* We agreed in *Thiele v. Norfolk & Western Railway Company* and held that § § 646.214(b)(3) and (4) preempt state law adequacy of warning claims when federal funds are used to install the warning devices and when those devices are installed and fully functioning. *68 F.3d 179, 184-85 (7th Cir. 1995).*

Here, the parties do not dispute that the crossing's warning devices were federally funded and approved by the FHWA and that they were functioning at the time of the collision. If this were a challenge under state law, then, Waymire's argument would be settled as a matter of law. To allow a plaintiff to argue adequacy of warning claims under FELA but not under state law would undermine the railroad safety uniformity intended by Congress and we decline to do this. We hold that FRSA supersedes Waymire's FELA action insofar as it alleges inadequate warning devices, as long as the devices were federally funded, operating, installed and approved in accordance with the regulations promulgated by the Secretary of Transportation under FRSA.

The Supreme Court recently reaffirmed that "sections 646.214(b)(3) and (4) . . . establish a standard of adequacy that 'determines the devices to be installed' when federal funds participate in the crossing improvement project."

Norfolk Southern Railway Company v. Shanklin, U.S. , *120 S. Ct. 1467, 1474, 146 L. Ed. 2d 374 (2000),* quoting *Easterwood, 507 U.S. at 671.* In *Shanklin,* the crossing had a reflectorized sign but no gates or flashing lights. The widowed plaintiff argued that the sign, alone, was an inadequate warning device under Tennessee law. The Court found the claim preempted: "Once the FHWA approved the project and the signs were installed using federal funds, the federal standard for adequacy displaced Tennessee statutory and common law addressing the same subject, thereby pre-empting respondent's claim." *Id.* at 1476.

Relying on *Shanklin,* we conclude that the requirements in sections 646.214(b)(3) and (4) establish a standard of adequacy and determine the type of warning devices that must be installed at a federally funded crossing improvement project. Given that the federal agency empowered by Congress to establish uniform, comprehensive federal safety standards related to warning devices at grade crossings has promulgated such regulations, federal common law and statutes on these issues are necessarily displaced. Therefore, Waymire's FELA claim asserting inadequate warning devices at the crossing is superseded by FRSA and its regulations. The judgment of the District Court in this regard is affirmed.

III. CONCLUSION

To treat cases brought under federal law differently from cases brought under state law would defeat FRSA's goal of uniformity. It would deny recovery to the motorist struck by the train, but not to the engineer operating the train. We do not believe that is the result envisioned by the statute or by the Supreme Court's decisions. To the extent that FELA, then, is inconsistent with FRSA on the issues of train speed and warning devices at grade crossings, we hold that FRSA supersedes FELA. Because N&W complied with FRSA and

its regulations, we find that summary judgment was properly granted and affirm the decision of the District Court.

AFFIRMED.

Footnotes

[1] Waymire also sued the truck driver and the truck driver's employer, but those claims were settled and are not part of this appeal.

[2] These suits are filed by the injured private citizen, not the injured railroad employee.

IP97-1914-C-T/G

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

JOSEPH J. WAYMIRE and
LINDA WAYMIRE, his wife,
Plaintiffs,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, and
HOGAN MOTOR LEASING, INC., a corporation, and
HOGAN TRANSPORT, INC., a corporation, and
JAY WERNER BUSSLER,
Defendants.

September 16, 1999, Decided

OPINION:

Entry on Defendant Norfolk and Western's Motion for Summary Judgment

The Plaintiffs, Joseph J. Waymire and Linda Waymire, brought this action following a collision between an automobile and a train on which Joseph was the conductor. Defendant Norfolk and Western Railway Company ("NW") moves for summary judgment in its favor. The Waymires oppose the motion. The court rules as follows.

I. Background

A train/motor vehicle collision occurred on June 28, 1996, at the intersection of NW's mainline tracks and McGalliard Street in Muncie, Indiana, giving rise to this action. A southbound NW train collided with an eastbound semi-tractor trailer rig stopped on the tracks. Joseph J. Waymire was employed by NW and was the conductor on the train involved in the collision.

At the time of the collision, the tracks in the vicinity of the McGalliard Street crossing were Class 4 tracks which carried a maximum permitted speed for freight trains of 60 m.p.h. The train was traveling at an approximate speed of 20 m.p.h. when the emergency brake was applied just before the collision. The cantilevered flashing warning light signals at the McGalliard Street crossing were operating at the time of the collision. These signals (or active warning devices) were placed into service on April 18, 1984, in connection with a signalization project of the City of Muncie, acting through the Indiana Department of Highways, and NW. The Federal Highway Administration ("FHWA") approved the signalization project and authorized the expenditure of federal funds to pay for the installation of the active warning devices at the grade crossing.[1]

II. Discussion

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).* Material facts are those facts that might affect the outcome of the case under the governing law. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).*

The Defendant NW moves for summary judgment on Plaintiff Joseph Waymire's claims under the Federal Employers' Liability Act ("FELA"), *45 U.S.C. § § 51*-60, against it. (Linda Waymire asserts no claims against NW.) NW contends that the Federal Railway Safety Act of 1970 (the "FRSA"), *49 U.S.C. § § 20101*-21311, preempts Mr. Waymire's claims that NW negligently failed to provide him a safe place to work by failing to have controlled the speed of the train and failing to have considered favorably additional warnings of approaching trains at the McGalliard Street crossing.[2]

The determination of NW's summary judgment motion turns on the answer to the following question: Do the FRSA and regulations promulgated thereunder supersede allegations of unsafe train speed and inadequate warning devices in a FELA negligence action? To answer this question, the court must consider both the FELA and the FRSA. The FELA provides the exclusive remedy for an injury caused by "the negligence of [the railroad] . . . or by reason of any defect or insufficiency, due to its negligence, in its . . . equipment." *45 U.S.C. § 51*. The stated purpose of the FRSA "is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." *49 U.S.C. § 20101*. The FRSA contains an express preemption provision which provides:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement.

49 U.S.C. § 20106. To ensure uniformity in railroad safety, the FRSA expressly authorizes the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety . . . ." *49 U.S.C. § 20103.*

The Secretary has promulgated regulations under the FRSA setting maximum train speeds for certain classes of railroad track. *See 49 C.F.R. § 213.9.* The Secretary also has promulgated under the FRSA and the Highway Safety Act, through the Federal Highway Administration (FHWA), regulations regarding improvements to grade crossings and the use of particular warning devices at federally funded grade crossings. *See, e.g., 23 C.F.R. § 646.214.* Regulations promulgated pursuant to the FRSA "may pre-empt any state law, rule, regulation, order, or standard relating to railroad safety." *CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664, 123 L. Ed. 2d 387, 113 S. Ct. 1732 (1993).*

Mr. Waymire's FELA claims against NW, however, do not invoke the doctrine of federal pre-emption of a state law. Rather, the court is faced with the determination of which statute should give way when the FRSA and FELA are inconsistent. For the following reasons, the court concludes that when these two statutes are inconsistent, the FRSA supersedes the FELA in order to ensure uniformity in railway safety law.

A. Train Speed Claim

In *Easterwood*, the Supreme Court held that the regulations adopted by the Secretary of Transportation under the FRSA pre-empted the plaintiff's state law negligence claim asserting that the defendant's train was traveling at an excessive speed where the train's speed was within the maximum limits set by the regulations. *507 U.S. at 676.* In so holding, the Court explained that although the regulation addressing speed, *49 C.F.R. § 213.9(a)*, appeared to set only maximum allowable

speeds on certain types of tracks, when "understood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation . . . ." *Easterwood, 507 U.S. at 675.* Thus, the court held that regulation § 213.9 covered the subject matter of train speed and precluded additional state regulation of train speed. *Id.*

Following Easterwood's lead, two district courts have considered whether a railroad employee may maintain a FELA action alleging negligence as to train speed and have answered the question in the negative. *See Rice v. Cincinnati, New Orleans & Pac. Ry. Co., 955 F. Supp. 739, 740-41 (E.D. Ky. 1997); Thirkill v. J.B. Hunt Transp., Inc., 950 F. Supp. 1105, 1107 (N.D. Ala. 1996); but see Earwood v. Norfolk Southern Ry. Co., 845 F. Supp. 880 (N.D. Ga. 1993).* *Rice* and *Thirkill* are persuasive.

The *Rice* plaintiff, an engineer-trainee, allegedly suffered injuries when his train collided with a vehicle. He brought an action under FELA alleging that the train was traveling at an unsafe speed and that the grade crossing in question was unreasonably dangerous because of inadequate warning devices. The train was traveling within the maximum speed set by the regulations for the class of track. *See Rice, 955 F. Supp. at 739-40.* Recognizing that both the FELA and the FRSA were relevant, the court held that to the extent they are inconsistent, the FRSA supersedes the FELA "based on the policy embodied in the FRSA to ensure uniformity in law pertaining to railway safety." *Rice, 955 F. Supp. at 740* (citing *49 U.S.C. § 20106).* In so holding, the *Rice* court relied on *Easterwood's* analysis of the preemption of state law speed claims and reasoned:

> As previously noted, this is not a state law case; the FELA is the sole remedy for this plaintiff. However, the same rationale that

> supports pre-emption of an unsafe speed argument in a state law case also indicates that speed regulations adopted pursuant to the FRSA should supersede an unsafe speed argument in this FELA case.
>
> . . .
>
> If a plaintiff were allowed to argue unsafe speed under the FELA but not under state law, the railroad safety uniformity intended by Congress would be compromised. The FRSA therefore supersedes plaintiff's FELA action insofar as it asserts that the train was traveling at an unsafe speed, provided that the speed is in keeping with the FRSA regulation.

Id. at 740-41. Because the train was traveling within the speed limits set by the FRSA and its regulations, the court held that the FRSA superseded the plaintiff's argument that the train was traveling at an unsafe speed. *Id.* Also relying on *Easterwood*, the *Rice* court held the FRSA superseded the plaintiff's argument in a FELA action that the warning devices at the grade crossing at issue were inadequate because federal funds were used to install the devices at the crossing. *See Rice, 955 F. Supp. at 741.*

In *Thirkill*, the plaintiff, a railroad engineer, brought a FELA action seeking damages for injuries received in a grade crossing collision with a truck. The train was traveling within the speed limit at the time of the collision, but the plaintiff alleged that the train speed contributed to his injuries. *See Thirkill, 950 F. Supp. at 1106.* The court noted that since the train was traveling within the speed set by the Secretary's regulations, any speed claim brought by the truck driver or the trucking company would be precluded under *Easterwood. See id. at 1107.* Relying on the Congressional policy of

national uniformity of laws relating to railroad safety established by the FRSA and in furtherance of that uniformity, the court held that the same regulations applied to the plaintiff's FELA claims so that his train speed claim was precluded by the FRSA. *See Thirkill, 950 F. Supp. at 1107.*

This court agrees that the same rationale that supports pre-emption of state regulation of train speed supports the conclusion that speed regulations adopted under the FRSA supersede an unsafe speed argument in a FELA case. This conclusion finds support in congressional intent embodied in the FRSA's policy of ensuring national uniformity in railway safety laws. That uniformity may be achieved only when the same regulations covering train speed are applied to a plaintiff's negligence claims brought under the FELA as are applied to a plaintiff's state law negligence claims regarding train speed. To allow otherwise would create the dilemma that a railroad employee could bring a FELA action asserting negligent train speed, but a non-employee could not maintain state law actions asserting negligent train with respect to the same train traveling at one speed. Thus, the railroad safety regulations established under the FRSA would provide little guidance as to the safety standards to which the railroad could be held. The railroad could at one time be in compliance with federal railroad safety standards with respect to certain classes of plaintiffs yet be found negligent under the FELA with respect to other classes of plaintiffs for the very same conduct. So much for uniformity.

One district court has held to the contrary, but its decision is not persuasive. *See Earwood, 845 F. Supp. at 885.* The plaintiff, a railroad employee who was injured in a train-truck collision brought a FELA action alleging that the train was operating at an unsafe speed. *See Earwood, 845 F. Supp. at 883.* The *Earwood* court acknowledged that *Easterwood* would preempt a state law negligence claim of excessive speed but noted that the decision did not address FELA's

impact on the FRSA. *Id. at 885.* The court explained that it did not have to decide whether one of these statutes superseded the other "absent an intolerable or irreconcilable conflict between [the] two . . . ." *Id.* Finding no intolerable conflict between the two statutes, the court held that the FRSA did not preclude the plaintiff's FELA claims based on excessive speed because "the two statutes do not purport to cover the same areas." *Id.* It reasoned that the FRSA's regulations establish minimum safety requirements and that neither the FRSA or its regulations establish the standard of care the railroads owed to employees, whereas, the FELA is the exclusive remedy for an injured railroad employee to be interpreted broadly. The court also relied on cases in which the Railway Labor Act and Title VII have been held not to preclude FELA claims. *Id.*

On reconsideration, the *Earwood* court said the issue was not the interaction of the FELA and the FRSA but the impact of the FRSA's regulations on federal common law surrounding the FELA. *Id. at 889-90.* The court concluded that the FRSA's speed regulations did not preclude the FELA claims because the regulations "were not directed at the issue of employee safety." *Earwood, 845 F. Supp. at 891.* Again the court reasoned that the regulations established only minimum safety requirements and that railroads are held to a higher than minimum standard under the FELA. *Id.*

This court believes that *Earwood* was decided incorrectly. The FRSA, like the FELA, covers employee safety issues and the resulting standard of care railroads owe employees. The FRSA expressly states that its broad purpose is "to promote safety in *every area* of railroad operations and reduce railroad-related accidents and incidents." *49 U.S.C. § 20103*(a) (emphasis added). Employee safety unquestionably is an area of railroad safety. Thus, employee safety in trains at railroad grade crossings is an area of railroad safety. As

NW asserts, nothing in the FRSA suggests that railroad employees are excluded from its broad purpose.

Further, the FRSA's legislative history suggests that railroad employee safety was a significant motivation behind the FRSA's enactment. Before the FRSA's enactment, the Secretary of Transportation established a task force on railroad safety. The task force consisted of "representatives of the railroad industry, railroad labor organizations, and State regulatory commissions." H.R. Rep. No. 91-1194, *reprinted in* 1970 U.S.C.C.A.N. 4104, 4125. The task force advised the Secretary that "employee safety in railroad operations is of continuing concern," *id.* at 4127, and that "railroad operating personnel will continue to be the group most involved with rail safety, or the lack of it." *Id.* at 4128. The task force unanimously recommended broad federal regulation by the Secretary in the area of railroad safety "establishing safety standards in all areas of railroad safety. . . ." *Id.* at 4129. The House Report recommending the passage of the FRSA stated that "the primary purpose of this legislation . . . is to promote safety in *all areas* of railroad operations . . . ." *Id.* at 4104 (emphasis added). The House Report relied upon the task force's recommendation and specifically noted the number of railroad employees killed or injured in railroad grade crossing accidents. *Id.* at 4106, 4108. Thus, legislative history indicates that the safety of railroad employees was a motivating concern and purpose behind enactment of the FRSA. Logic and common sense dictate that the regulations promulgated by the Secretary under the FRSA are directed at the issue of railroad safety, including railroad employee safety.

As to the *Earwood* court's conclusion that the regulations establish minimum safety standards, language in *Easterwood* suggests otherwise:

On their face, the provisions of [the speed regulation] address only the maximum speeds at which trains are permitted to travel given the nature of the track on which they operate. Nevertheless, related safety regulations adopted by the Secretary reveal that the limits were adopted only after the hazards posed by track conditions were taken into account. Understood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation of the sort respondent seeks to impose on petitioner.

Easterwood, 507 U.S. at 674. As this passage indicates, the regulations do not set minimum safety requirements; rather, the FRSA and its regulations establish the federal safety standards in all areas of railroad safety. This necessarily includes the safety standards governing the railroads' actions with regard to their employees. Arguably then, to the extent federal common law would be inconsistent with the FRSA's speed regulations, the FRSA and its speed regulations preclude additional regulation under federal common law.

Mr. Waymire asserts, as did the *Earwood* court on reconsideration, that the issue is whether the FRSA abrogates federal common law negligence encompassing the FELA. In arguing that it does not, Mr. Waymire relies on language from *United States v. Texas, 507 U.S. 529, 123 L. Ed. 2d 245, 113 S. Ct. 1631 (1993),* which addressed the abrogation of federal common law by a federal statute (the Debt Collection Act). The Court there explained:

> "statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." In such cases, Congress does not write upon a clean slate. In

> order to abrogate a common law principle, the statute must "speak directly" to the question addressed by the common law . . . . "Courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the contrary is evident.'"

507 U.S. at 534-5 (internal citations omitted). Mr. Waymire contends that the FRSA does not speak directly to the questions addressed by common law because it does not state that it limits railroad employee FELA negligence claims, is not aimed at employee safety and establishes only minimum safety standards regarding train speed. The arguments concerning employee safety and minimum safety standards are rejected for the reasons stated *supra*.

As to his other argument, the FRSA's failure to state that it limits FELA negligence claims regarding train speed or warning devices is not fatal. "Congress need not 'affirmatively proscribe' the common-law doctrine at issue." *Texas, 507 U.S. at 534* (internal citations omitted). Instead, the inquiry is whether the statutory purpose evinces a congressional intent contrary to the federal common law. *See Texas, 507 U.S. at 534.* This inquiry "involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law." *City of Milwaukee v. Illinois, 451 U.S. 304, 315 n. 8, 68 L. Ed. 2d 114, 101 S. Ct. 1784 (1980).*

The FRSA's scope is quite broad: it was enacted to promote safety in all areas of railroad operations. To achieve this purpose, the FRSA grants the Secretary of Transportation broad powers to promulgate regulations for every area of railroad safety. 49 C.F.R. § 20103(a). Pursuant to that

authority, regulations regarding train speeds and warning devices installed at federally funded grade crossing improvement projects were adopted. As the *Easterwood* Court indicated, these regulations "subsume the subject matter of the relevant state law," *Easterwood, 507 U.S. at 664.* These regulations speak directly to the question formerly addressed by federal common law regarding safe train speeds and adequate warning devices. Thus, the FRSA evinces a congressional intent and statutory purpose, manifested through the regulations, to supplant federal common law on train speed and warning devices.

Mr. Waymire argues that case law, namely *Sheehy v. Southern Pacific Transportation Company, 631 F.2d 649 (9th Cir. 1980),* and *Mosco v. Baltimore & Ohio Railroad, 817 F.2d 1088 (4th Cir. 1987),* establishes that the FRSA does not preclude FELA claims. These cases, however, are easily distinguishable because their facts are dissimilar and they involve the interaction of the FELA and federal statutes other than the FRSA. In *Sheehy*, a railroad employee sued his employer under the Federal Safety Appliance and Equipment Act, (the "FSAA"), *45 U.S.C. § 11,* alleging that the railroad maintained a defective sill step. The FSAA requires all railroad cars to be equipped with "secure" sill steps. A regulation promulgated under the FSAA specified the proper physical location of sill steps. *See Sheehy, 631 F.2d at 653.* The court held that compliance with that regulation did not preclude the plaintiff's claim because the regulation covered the physical location of the step; it did not address whether a step could be found not secure and in violation of the FSAA for reasons other than its physical location, *e.g.*, the step was worn or bent. *See id.* Here, the train speed regulation clearly addresses whether the train's speed was excessive. The adequate warning devices regulation has a similarly clarity. Thus, the regulations at issue in this case are unlike the regulation at issue in *Sheehy*, and that case provides no

support for Mr. Waymire's train speed and inadequate warning devices claims.

In *Mosco*, a railroad employee was injured when a rock or similar object came through an open window of the locomotive striking him in the head. He sued his employer under the Federal Boiler Inspection Act (the "BIA"), § *45 U.S.C. 23* (1982), alleging that the windows should have been equipped with protective screens, bars, grates or similar devices. *See Mosco, 817 F.2d at 1089.* The defendant moved in limine to exclude evidence concerning the absence of such devices and the argument that their absence violated the BIA. The district court granted the motion, and the Fourth Circuit affirmed, concluding that the devices proposed by the plaintiff were not required or covered by the BIA or regulations. *Id. at 1090-91.* The court observed, however, that the plaintiff might have stated a claim under the FELA because devices "that do not fall within the coverage of the [BIA] Act are not therefore excluded from the usual rules of liability." *Id. at 1092.* In contrast, train speed and warning devices undisputably are within the coverage of the FRSA's regulations. Thus, Mr. Waymire's reliance on *Mosco* is misplaced.

It is undisputed that the train in this case was traveling within the maximum speed set for the track at issue by the applicable regulation. Thus, Mr. Waymire's FELA claim based upon an alleged excessive train speed is superseded by the FRSA and its applicable regulations.

B. Grade Crossing Warning Devices Claim

The *Easterwood* Court also decided that certain regulations regarding railroad grade crossing improvements, when applicable, pre-empt state law negligence claims asserting that warning devices at grade crossings were inadequate. *See Easterwood, 507 U.S. at 670.* One applicable regulation

provides that for grade crossing improvement projects in which "Federal-aid funds participate in the installation of the devices," *23 C.F.R. § 646.214(b)(3)* and (4), certain warning devices are to be installed. *See Easterwood, 507 U.S. at 666.* For crossings that are not covered by § 646.214(b)(3), "the type of warning device to be installed, whether the determination is made by a State . . . agency, and/or the railroad, is subject to the approval of the FHWA." *23 C.F.R. § 646.214(b)(4); see also Easterwood, 507 U.S. at 667, 670.* The Court concluded that § § 214(b)(3) and (4) covered the subject matter of warning devices at grade crossings for projects in which federal funds participated in the installation of warning devices such that state regulation of such warning devices was preempted. *See id. at 670-71; see also Thiele v. Norfolk & W. Ry. Co., 68 F.3d 179, 184-85 (7th Cir. 1995)* (holding § 646.214(b)(3) and (4) preempt state law adequacy of warnings claims when federal funds are used to install warning devices at crossings and devices are installed and fully operational); *accord Rice, 955 F. Supp. at 741* (holding that the FRSA superseded the plaintiffs argument in a FELA action that the warning devices at the grade crossing at issue were inadequate because federal funds were used to install the devices at the crossing). The *Easterwood* court held, however, that these regulations did not preempt the plaintiff's grade crossing warning devices claim because the regulations were inapplicable to that case--the warning devices were not installed at the crossing and no federal funds were used for the grade crossing improvement project. *See 507 U.S. at 671-73.*

It is undisputed that the grade crossing improvement project for the crossing at issue was federally funded and approved by the Secretary's designee, the FHWA. The warning devices at the crossing were installed in that project and the warning devices were operational at the time of the collision. Therefore, Mr. Waymire's FELA claim asserting inadequate

warning devices at the crossing in question is superseded by the FRSA and its applicable regulations.

III. Conclusion

Because Mr. Waymire's FELA claims against NW are superseded by the FRSA and its train speed and warning device regulations, NW's motion for summary judgment will be **GRANTED**, thus disposing of all claims against NW.

The claims against NW are separate and distinct from all of the Plaintiff's other claims against the remaining Defendants. This ruling completely disposes of the case and all claims with respect to NW. This disposition has no bearing on the remaining claims in the case against the other defendants. As a result, there is no reason to delay a final adjudication of the claims against NW while awaiting disposition of the other claims.

The court, therefore, finds that there is no just reason for delay and that final judgment should be entered, pursuant to Fed. R. Civ. P. 54(b), in favor of the Defendant NW and against the Plaintiff Joseph J. Waymire. The Clerk of the Court is **DIRECTED** to enter judgment in accordance with this entry.

ALL OF WHICH IS ORDERED this 16th day of September 1999.

John Daniel Tinder, Judge

United State District Court

Footnotes

[1] The Secretary of Transportation has promulgated regulations regarding railroad grade crossing improvements through the FHWA under the FRSA and the Highway Safety Act of 1973, *23 U.S.C. § 130,* including *23 C.F.R. § 646.214(b)(3)* and *(4). Pursuant to § 646.214(b)(3)* and *(4),* a project for grade crossing improvement must include either an automatic gate or receive the approval of the FHWA.

[2] NW asserts that on or about October 19, 1998, Mr. Waymire added another theory of negligence against it--that it was negligent in not taking steps to coordinate the timing and configuration of the traffic lights at the intersection of Broadway and McGalliard streets with the railway crossing lights at the intersection. (Def. NW Br. in Support of Mot. for Summ. J. at 2 (citing Pl. Joseph J. Waymire's Additional Contention Against Def. NW.)) The court has searched for this Additional Contention cited by NW, but has been unable to locate it anywhere in the court's file. However, this third theory of negligence is not asserted in the Amended Complaint. Even if this theory were asserted in the Amended Complaint, like the second theory, it concerns the adequacy of the warning devices at the railroad crossing.

Supreme Court, U.S.
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No. 00-594

In the

Supreme Court of the United States

Joseph J. Waymire,

Petitioner,

versus

Norfolk and Western Railway Company.,

Respondent..

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE UNITED TRANSPORTATION UNION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF BEFORE THE COURT'S CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI

NOW COMES Amicus Curiae, The United Transportation Union, in support of petitioner, Joseph J. Waymire, by its attorney, Clinton J. Miller, III, pursuant to United States Supreme Court Rule 37, and moves this Honorable Court for leave to file an Amicus Curiae Brief in support of the petitioner's Petition for Writ of Certiorari and, in support thereof, states:

1. Respondent, Norfolk and Western Railway Company, through its attorney, Mr. Geoffrey L. Blazi, has not provided its consent to the submission of this Amicus Curiae Brief in support of the petitioner's position. However, petitioner has provided his consent.

2. Amicus Curiae, the United Transportation Union, is a labor union representing among others, railroad transportation operating employees on every major railroad in the United States. The railroad operating employees represented by the United Transportation Union rely on the protection of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, to compensate them for on-the-job injuries.

3. Petitioner brought a cause of action against respondent pursuant to the FELA due to injuries he sustained in a train/motor vehicle collision on June 28, 1996. Respondent filed a Motion for Summary Judgment, which was granted by the district court. On July 14, 2000, the United States Court of Appeals for the Seventh Circuit issued its decision affirming the district court's decision in all respects. The Court of Appeals held that a railroad defendant in a FELA case could not be liable for excessive speed and inadequate crossing protection claims where both the train speed and railroad crossing protection complied with regulations prescribed by the Secretary of Transportation

pursuant to the Federal Railway Safety Act of 1970 ("FRSA"), 49 U.S.C. §§ 20101 - 21311. The Court of Appeals held that for purposes of train speed and railroad crossing protection, petitioner's FELA claims were superseded by the FRSA of 1970.

4. Amicus Curiae United Transportation Union is especially concerned that should the Court of Appeals decision be upheld, it would severely diminish FELA plaintiffs' ability to recover against their employer for on-the-job injuries. Contrary to the decision below, this Court has never ruled that a railroad employee's FELA claims are superseded by the FRSA.

WHEREFORE, Amicus Curiae, The United Transportation Union, respectfully prays that this Honorable Court grant it leave to file an Amicus Curiae Brief in support of petitioner's Petition for Writ of Certiorari.

Respectfully submitted,
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QUESTION PRESENTED

Whether a regulation prescribed by the Secretary of Transportation pursuant to the Federal Railway Safety Act of 1970 ("FRSA"), 49 U.S.C. §§ 20101 - 21311, supersedes a claim brought pursuant to the Federal Employers' Liability Act ("FELA").

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The United Transportation Union is a labor union representing, among others, railroad transportation operating employees on every major railroad in the United States. On a daily basis, railroad workers put their own safety at risk and rely on the protection of the Federal Employers' Liability Act ("FELA") 45 U.S.C. §§ 51-60. This Act is vital to the ability of these workers to safely and efficiently perform their duties. The United Transportation Union fully supports the arguments presented on behalf of the petitioner, Joseph J. Waymire, and urges this Court to review the decision of the United States Court of Appeals for the Seventh Circuit and, ultimately, to vacate and reverse the order below and remand the matter to the district court for trial. Although the decision of the Court below is important to Mr. Waymire, it has even greater significance for the thousands of railroad workers in the United States who are the life blood of our railway system.

In this case, the Court of Appeals has misapplied the previous decisions of this Court which have held that FELA plaintiffs are treated differently than common law plaintiffs. It was Congress' intent to provide broader protection for FELA employee plaintiffs than typical common law plaintiffs because the FELA is a work-related compensation statute. The decision below has severely undermined FELA plaintiffs' ability to recover against their employers for on-the-job injuries. In ruling that by complying with the Code of Federal Regulations ("CFR") the railroad has fulfilled its obligation under the FELA to provide a reasonably safe place to work, the Court of Appeals has ignored the scope and intent of the FELA. The Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20101 et seq., does not impede or limit a railroad employee's right to recover for on-the-job injuries pursuant to the FELA. Contrary to the decision below, this Court has never ruled that an employee's FELA

claims are superseded by the FRSA.

If the decision below is upheld, thousands of railroad employees who travel over railroad crossings and are exposed to the risk of harm of train/motor vehicle collisions will now be severely undermined in making improper speed and inadequate crossing protection claims pursuant to the FELA. This negative impact on the rights of FELA plaintiffs is of vital interest to the United Transportation Union. Amicus curiae believes that its perspective will complement that of petitioner and will provide assistance to this Court in deciding the issues.[1]

INTRODUCTION AND SUMMARY

Petitioner, Joseph J. Waymire, initiated this suit in the United States District Court for the Southern District of Indiana against respondent pursuant to the FELA due to the injuries he sustained on June 28, 1996 in a train/motor vehicle collision in Muncie, Indiana. The alleged occurrence took place at the McGalliard grade crossing, which was protected with flashing lights and bells.

The evidence obtained during discovery revealed that the train on which Petitioner was riding collided with a truck which was trapped on the tracks because of traffic conditions. Discovery further revealed that petitioner and other railroad employees had, prior to the alleged occurrence, observed other motor vehicles trapped on the McGalliard crossing because of traffic conditions as trains approached. Moreover, accident reports from both the Muncie Police Department and respondent's police revealed four motor vehicle/train accidents and seven "near miss" incidents at this crossing in the seven years prior to the alleged occurrence.

The Federal Railroad Administration ("FRA") had

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[1] Respondent has not provided its consent to submission of this brief. Petitioner has provided his consent.

designated the track at McGalliard crossing as Class 4 track because it is mainline track. Railroad management employees, as well as petitioner's expert, explained that this FRA designation primarily refers to the type of maintenance a railroad should provide at a certain location. The class 4 designation allows trains to operate at speeds of up to 60 mph. Despite this authority to run trains at high speeds, up until 1992, respondent had maintained a speed limit of 10 mph. In 1992, respondent raised the speed limit to 25 mph to save on the economic costs of operating and maintaining a train.

The engineer operating the train and petitioner testified that had the prior speed limit of 10 mph been in effect on the day of the alleged occurrence, the train involved would have been able to stop prior to impact. This testimony was confirmed by respondent's Road Foreman of Engines. In addition, petitioner produced expert testimony which established that respondent's decision to increase train speed from 10 mph to 25 mph at the McGalliard crossing was a cause of the accident. Expert opinion also established that respondent should never have increased the speed limit at the McGalliard crossing without the installation of crossing gate protection at the crossing.

Respondent moved for summary judgment, which was granted by the district court despite the substantial evidence of negligence established by petitioner. On July 14, 2000, the United States Court of Appeals for the Seventh Circuit issued its decision affirming the district court's decision in all respects. Relying on *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993) and *Norfolk Southern Railway Co. v. Shanklin*, 120 S.Ct. 1467, 146 L.Ed 2d 374 (2000), the Court of Appeals ruled that if an FELA defendant complied with the FRSA, it could not be held liable for excessive speed and inadequate crossing protection claims. For purposes of train speed and railroad crossing protection, the Court of Appeals held that petitioner's FELA claims were superseded by the FRSA.

ARGUMENT

I.

The FRSA Of 1970 Was Enacted To Supplement, Not Supersede, Existing Federal Laws Such As The FELA And This Issue Is A Question Of First Impression Before The Court.

In 1970, Congress passed the FRSA, 49 U.S.C § 20101 et seq., for purposes of promoting rail safety and reducing rail accidents. Congress by virtue of 49 U.S.C. § 20103, General Authority, gave the Secretary of Transportation the authority to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970." 49 U.S.C. § 20103(A) (emphasis added). Congress enacted the FELA in 1908 with a focus on reducing injuries and death resulting from accidents on interstate railroads. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994). Nothing in the language of the FRSA, either stated or implied, suggests that it was Congress' intent with the passage of the FRSA to impede or limit a railroad employee's right to recover for on-the-job injuries pursuant to the FELA. This Court has held that the FELA is a broad remedial statute which Congress enacted with the intent to provide liberal recovery for injured workers. *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958). The FRSA does not provide the Secretary of Transportation the authority to supersede or undermine the FELA and the federal common law of rights and obligations under this Act of Congress.

In *United States v. Texas*, 507 U.S. 529 (1993), this Court stated: "Courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except when statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. at 534 (citations omitted). The language of the FRSA in no way

suggests that Congress intended to undermine a plaintiff's claim under the FELA as developed by federal common law. Because there is no "statutory purpose to the contrary," the FRSA should not be used as a means to displace petitioner's previously available FELA claim.

This is a case of first impression in this Court. The interaction of the FELA and the FRSA is of vital import to thousands of railroad employees who are at risk while operating trains which travel over railroad grade crossings. The decision below reads into the FRSA the authority to supersede a FELA plaintiff's excessive speed and crossing protection claims when no such authority is stated or implied in the FRSA. This Court should address this question of exceptional importance relating to a uniform federal compensation statute.

II.

In Ruling That Petitioner's Speed And Crossing Protection FELA Claims Are Superseded By The FRSA, The Decision Below Severely Undermines The Scope And Intent Of The FELA

As the labor representative of thousands of railroad operating employees who operate trains which travel over railroad crossings nationwide, United Transportation Union known one of the dangers of a railroad employee's job is the not insubstantial risk of being involved in a train/motor vehicle collision. As a result of the decision below, a railroad employee's means of recovery has been severely diminished if that employee has the misfortune of being injured in a motor vehicle/train collision. Because the FELA is a railroad employee's remedy for on-the-job injuries, it is his or her primary means of injury compensation. All too often the driver of the vehicle involved in a crossing accident will have inadequate insurance to fairly compensate a railroad

employee for on-the-job injuries. As a result of the decision below, the membership of the United Transportation Union face the real prospect of being left without a means of recovery pursuant to the FELA if they are injured in a motor vehicle/train collision.

The decision below is contrary to the intent and scope of the FELA. In affirming the district court's summary judgment ruling, the Seventh Circuit, relying on *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993) and *Norfolk Southern Railway Co. v. Shanklin*, 120 S.Ct. 1467, 146 L.Ed 2d 374 (2000), reasoned that since this Court has ruled in a state common law action that compliance with promulgated regulations under the FRSA precludes excessive speed and crossing protection claims, for the sake of national uniformity, under the FRSA, the same standard should be applied to both state law and FELA cases. The Seventh Circuit reasoned that the FRSA state law preemption provisions of 49 U.S.C § 20106 and their stated goal of national uniformity applied to a claim brought pursuant to FELA. This is the first decision issued by a Court of Appeals where the FRSA was found to preclude and effectively preempt a plaintiff's FELA claim.

What is particularly troubling to is that in this case respondent clearly recognized that the FRA authorized speed was completely inappropriate with respect to the safe operation of trains at the McGalliard crossing. Up until four years prior to the accident, because of heavy traffic conditions, respondent had operated trains at 10 mph at this location, 50 mph below the FRA authorized speed. In 1992, respondent raised the speed limit to 25 mph, still 35 mph below the FRA authorized speed. However, despite operating trains at speeds substantially below the speed authorized by the FRA, the evidence established in discovery clearly shows that respondent was negligent in raising the speed limit from 10 mph to 25 mph at the McGalliard Crossing. The evidence established that it was not uncommon for motor vehicles to become trapped on

McGalliard Crossing as trains approached because of traffic conditions. The evidence presented to the district court showed that in raising the speed limit from 10 mph to 25 mph, the ability for a train to stop at this recognized problematic crossing was severely diminished.

A material issue of fact existed as to whether or not respondent was negligent in raising the speed limit and in not installing crossing gate protection once the decision was made to increase the speed limit. The FELA requires that a railroad use ordinary care to provide its employees with a reasonably safe place to work. In this case, the Court of Appeals decided that respondent fulfilled its obligation under the FELA to provide a reasonably safe place to work by complying with regulations which had absolutely no correlation to reasonably safe conduct at the time and place alleged. Not only is the decision below contrary to the intent of the FELA, the ironic result of the Seventh Circuit's decision is that it will decrease a railroad's incentive to operate a train at a safe speed or provide adequate warning and signal protection at a particular crossing.

In ruling that cases brought under federal law should be treated the same as state common law causes of action, the Court of Appeals has disregarded the previous decisions of this Court which have held that FELA plaintiffs are treated differently under the law than common law plaintiffs. In *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500 (1957), *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958), and *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), this Court held that the quantum of evidence required to establish liability in a FELA case is much less than in an ordinary common law negligence action. As this Court stated in *Sinkler v. Missouri Pacific R.R.*, 356 U.S. 326 (1958):

> [I]n interpreting the FELA, we need not depend upon common

> law principles of liability. This statute, an avowed departure from the rules of common law, was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. The cost of human injury, an inescapable expense of railroading must be borne by someone and the FELA seeks to adjust that expense equitably between the worker and the carrier.

Sinkler, 356 U.S. at 329-30 (Citations omitted). Moreover in *Crane v. Cedar Rapids and Iowa City Ry.*, 395 U.S. 164, 166 (1969) this Court distinguished between the defenses available to a railroad defendant in a common law action as opposed to an FELA action involving the Safety Appliance Act. Unlike a common law case, this Court held that the defenses of contributory negligence and assumption risk were not available to a defendant in an FELA case involving the Safety Appliance Act. *Crane*, 395 U.S. at 166. In sum, this Court has always recognized the unique status of a FELA plaintiff because the FELA is the primary means of compensation for a railroad employee who suffers an on the job injury. In addition, this Court has recognized that trial by jury is part of the remedy in FELA cases. *Altantic v. Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 360 (1962).

The Court of Appeals in the decision below ignored the scope and purpose of the FELA enunciated by this Court in prior decisions. In ruling that for purposes of train speed and crossing protection, the FRSA supersedes the FELA, the Court of Appeals has in effect taken on the legislative role of

amending the FELA. This decision is a severe blow to the federal statutory rights of railroad employees who face the risk of injury in operating trains over railroad crossings throughout America. The United Transportation Union respectfully submits that the decision below cries out for further review by this Court and ultimate reversal.

CONCLUSION

For all of the foregoing reasons, Amicus Curiae, United Transportation Union would respectfully requests that the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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No. 00-594

IN THE

Supreme Court of the United States

JOSEPH J. WAYMIRE,
Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether compliance with railway safety regulations adopted by the Secretary of Transportation pursuant to the Federal Railway Safety Act ("FRSA"), 49 U.S.C. § 20106, protects a railroad from a claim of negligence arising under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51, when the claim is based on the same subject matter covered by the regulations.

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

All of the parties to the proceeding below are named in the caption. Respondent Norfolk and Western Railway Company no longer exists as a separate entity and has been merged into the Norfolk Southern Railway Company, the parent of which is the Norfolk Southern Corporation. No other publicly held corporation owns more than 10% of respondent's stock.

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IN THE

Supreme Court of the United States

No. 00-594

JOSEPH J. WAYMIRE,

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NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

This is a strikingly unusual case in which a railroad employee has sued his employer under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51, for injuries allegedly suffered in a rail-highway grade crossing accident on the theory that the railroad was negligent despite its compliance with federal regulations. Most such cases are brought by an individual in the vehicle that is struck by the train, who sues under state tort law. See Pet. App. 4a ("The vast majority of courts examining lawsuits arising out of automobile/train collisions do so under state law."). Petitioner has identified only three reported cases other than the decision below involving this situation in the 30 years since the Federal Railroad Safety Act ("FRSA") was enacted, all from the district courts.[1] Indeed, petitioner recognizes that the issue

[1] *See* Pet. 12 (citing *Rice* v. *Cincinnati, New Orleans & Pac. Ry.*, 955 F. Supp. 739 (E.D. Ky. 1997); *Thirkill* v. *J.B. Hunt Transp., Inc.*, 950 F. Supp. 1105 (N.D. Ala. 1996); *Earwood* v. *Norfolk S. Ry.*, 845 F. Supp. 880 (N.D. Ga. 1993)).

was one of "first impression" at the court of appeals level when it was decided by the Seventh Circuit in this case. Pet. 11; see also *id.* at 12 ("This is the first decision issued by a Court of Appeals wherein the FRSA precludes a plaintiff's FELA claim."). Given the absence of any conflict in the Circuits and the infrequency with which the issue arises, this case is manifestly unworthy of this Court's review.

1. On June 8, 1996, petitioner was a conductor of a train on a railroad operated by respondent. The train collided with a truck at a grade crossing in Muncie, Indiana. Fortunately, no one was seriously injured physically by the accident, but petitioner claimed that he developed post-traumatic stress syndrome. Accordingly, he filed suit against respondent under FELA in the United States District Court for the Northern District of Indiana, alleging that respondent's negligence caused the petitioner's injuries. Specifically, petitioner argued that the train operated at an excessive speed by traveling at 25 miles per hour approaching an allegedly hazardous grade crossing and that the railroad negligently failed to provide additional warning protections at the grade crossing to prevent vehicles from getting trapped on the tracks.

Respondent filed for summary judgment, claiming that neither common law theory was viable in light of regulations adopted by the Secretary pursuant to FRSA. Respondent argued that speed regulations adopted by the Secretary covered the railroad's responsibiiities regarding train speeds, and thus no claim of negligence was available if the railroad complied with the Secretary's speed regulation. See *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 674-75 (1993). Similarly, the railroad contended that the crossing protections had been installed using federal funds and that the Secretary of Transportation (and not respondent) was therefore responsible for the level of protection provided at that crossing. See *id.* at 670-71; *Norfolk S. Ry.* v. *Shanklin*, 120 S. Ct. 1467, 1474-76 (2000).

2. The district court granted the motion and dismissed petitioner's suit. The district court relied upon the policy embodied in FRSA (49 U.S.C. § 20106) "'to ensure uniformity in law pertaining to railway safety.'" Pet. App. 14a (quoting *Rice*, 955 F. Supp. at 740). The court reasoned that once the Secretary had promulgated a regulation designed to promote safety in a particular rail operation, that regulation covered the subject matter and any claims of negligence based on a different legal standard would necessarily create disuniformity. *Id.* at 16a. Given the comprehensive delegation of authority under FRSA to the Secretary to regulate all facets of rail safety, the district court concluded that "the FRSA evinces a congressional intent and statutory purpose, manifested through the regulations, to supplant federal common law on train speed and warning devices." *Id.* at 21a.

The court of appeals affirmed. Like the district court, the court of appeals viewed the issue as "whether a railroad company can be liable in a FELA negligence action claiming unsafe speed and inadequate warning devices when the complained of conduct complies with the conduct mandated by FRSA and its regulations," Pet. App. 3a. The court held that FRSA's command of uniformity in railway safety law trumps petitioner's FELA claims. *Id.* at 7a. Accordingly, the court concluded that "because [respondent] complied with FRSA and its regulations," there was no basis for imposing liability under FELA. *Id.* at 7a-8a.

REASONS FOR DENYING THE PETITION

Petitioner demonstrates why the case does not warrant review by this Court. He correctly observes that the decision below stands alone at the court of appeals level in addressing the issue presented and that there are only three reported district court opinions on the subject. This situation plainly does not deserve this Court's attention. See Sup. Ct. R. 10. Moreover, the decision below is fully consistent with this

Court's decisions concerning the relationship between the federal common law and congressional enactments, and is a proper reconciliation of FELA and FRSA. In sum, the Court should deny the petition.

1. Petitioner's first argument (Pet. 8-11) is that the Secretary's safety regulations cannot affect petitioner's FELA claim because the Secretary only has authority under FRSA to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970," 49 U.S.C. § 20103. According to petitioner, a railroad safety regulation does not supplement FELA if it precludes liability in certain circumstances.

Petitioner's reliance on this point is odd since it was not even addressed below. Moreover, the argument is entirely misplaced; the limitation on the Secretary's authority in section 20103 has nothing to do with FELA.[2] But even if it

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[2] The House Report accompanying FRSA expressly stated that the limitation in section 20103 was solely "to make clear that this grant of jurisdiction d[id] not replace the existing rail safety statutes and implementing regulations *transferred to the Department of Transportation when it was established*." H.R. Rep. No. 91-1194, at 16 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4113-14 (emphasis added). In other words, Congress clarified that the Secretary did not have carte blanche to regulate railroad safety without regard to the limitations and directives of existing statutes, and their implementation in existing regulations, which had worked well in the specific areas covered. *Id.* The railroad safety statutes to which Congress referred in section 20103 were such provisions as the "Safety Appliance Acts, Signal Inspection Act, Ash Pan Act, Locomotive Inspection Act, Accident Reports Act, and the Hours of Service Act." *Id.* at 8, *reprinted in* 1970 U.S.C.C.A.N. at 4105. FELA was not a railroad safety statute administered by the Secretary, and was thus not included in Appendix B to the House Report, which set forth the "complete text of existing railroad safety laws" addressed in section 20103. *Id.* at 16, *reprinted at* 1970 U.S.C.C.A.N. at 4114; *see id.* at 40-65 (App. B), *reprinted in* 1-4 *House Miscellaneous Reports on Public Bills, IV* (1970). Thus, nothing in section 20103 limits the authority of the Secretary to issue safety rules with regard to matters that may be the subject of a suit under FELA.

were otherwise, the regulation does no more than supplement FELA in any relevant sense.

Under FELA, liability was and is predicated on the railroad's "negligence." 45 U.S.C. § 51. "As a general negligence statute, FELA neither prohibits nor requires specific conduct by a railroad." Pet. App. 3a. Obviously, negligence is not a self-defining concept. Instead, it requires a determination, *inter alia*, of what is the railroad's duty of care. What the FRSA regulations do is no more than give content to that duty. The decision below holds that, once the Secretary has defined the railroad's duty of care by regulation, a jury may not impose a conflicting duty of care upon the railroad. Thus, there is no real tension between the regulations and FELA; they operate in complete harmony, with the federal regulation supplementing FELA by defining the duty of care. The decision reconciles FELA and FRSA by eliminating the absurdity that a plaintiff may ask a jury to find conduct to be negligent which the Secretary (and this Court) have already found "is not culpable negligence." *Id.* at 5a.

Petitioner contends (Pet. 9-10) that this case presents issues under *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), and *United States* v. *Texas*, 507 U.S. 529 (1993), as to when statutes displace pre-existing federal common law rules. Even if that were true, it would not justify review by this court. The question under *City of Milwaukee* is "whether the scheme established by Congress addresses the problem formerly governed by federal common law." 451 U.S. at 315 n.10. As the district court held, FRSA and the regulations issued thereunder "evince[] a congressional intent and statutory purpose . . . to supplant federal common law on train speed and warning devices." Pet. App. 21a. There is no displacement of FELA generally; rather the Secretary's regulations simply supply in specific circumstances a definition of the duty of care that otherwise would be determined retrospectively by a lay jury on the facts of a

particular case. Not only is the decision below clearly correct, but at most this petition merely contests a specific application of the settled rule of law of *City of Milwaukee*. Such a claim of error is inherently unworthy of review by this Court. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

2. Petitioner's second argument (Pet. 11-13) concerning the proper interpretation of FRSA's preemption provision similarly provides no basis for this Court to grant certiorari. To be sure, the specific preemption provisions in FRSA are by their terms limited to supplanting state law, and the court of appeals did not suggest otherwise. Pet. App. 4a. It merely found the statute, and this Court's interpretation of it in *Easterwood*, to be "instructive" in determining "the interaction of two federal statutes." *Id.* at 4a.

FRSA states an affirmative command of uniformity of railroad safety laws: "Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. Although the specific FRSA preemption provisions in furtherance of that policy do not deal directly with federal common law, there is no reason why a court should not take that declared national policy into account in reconciling an asserted conflict between two federal statutory schemes. A jury's determination of a duty of care under FELA that conflicts with a duty of care established by federal regulation destroys the national uniformity of railroad safety laws, no less than does a jury determination under state tort law.[3] Thus, imposing liability under federal law for conduct that complies with safety

[3] Petitioner invokes *Crane* v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164, 166 (1969), but *Crane* simply holds that in passing *FELA*, Congress contemplated different treatment of railroad employees and state tort-law plaintiffs. Decided before FRSA was even enacted, *Crane* has no bearing on the vindication of FRSA's policy of national uniformity in railroad safety laws.

regulations directly interferes with FRSA's overriding objectives.[4]

3. Petitioner is also correct (Pet. 16-18) that plaintiffs bringing negligence claims under FELA do not confront the same defenses to a cause of action that many or even most plaintiffs face when they sue under state common law. But that does not convert FELA into a no-fault workers compensation statute. It remains necessary for petitioner to prove negligence, which requires a breach of a duty of care. FRSA's regulations define the relevant duty—train speed limits and appropriate grade crossing protections—and petitioner conceded below (Pet. App. 22a, 23a) that the railroad did not violate those requirements. Again, by allowing FRSA to define the standard of care, the Seventh Circuit in fact harmonized the two statutory schemes.[5]

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[4] Petitioner's reliance (Pet. 13-14) on Section 5 of FELA, 45 U.S.C. § 55, is plainly misplaced. That provision does not apply to the Secretary's regulation. It refers to actions by the railroad that "exempt *itself* from any liability." *Id.* (emphasis added). Such actions include an exemption in the railroad's "regulations," a term often used in statutes of FELA's vintage to refer to a common carrier's own rules. *Cf., e.g.*, 47 U.S.C. § 201(b) (Communications Act of 1934) (requiring common carrier to adopt just and reasonable "charges, practices, classifications, and regulations"). Here, the *Secretary* provides the relevant standard absolving the railroad of liability if the railroad complies with that safety standard. Moreover, FRSA does not "exempt" the railroad from liability. It merely establishes the relevant standard of care. Failure to comply with that standard exposes the railroad to liability.

[5] Although the lower courts generally spoke accurately of petitioner's specific *claims* under FELA as being "superseded by FRSA and its regulations," (Pet. App. 7a; *see also id.* at 5a, 16a, 22a, 23a-24a),.they also sometimes more loosely characterized their holdings in terms of FRSA's policy of uniformity "supersed[ing]" FELA itself (*id.* at 7a, 23a). Those latter characterizations are not, however, necessary to the courts' holdings. It is more apt (as the court of appeals also did (*id.* at 3a)) to describe FRSA's more specific standards as providing the relevant basis for determining liability under FELA. Nevertheless, even if the issue were

4. Finally, petitioner complains (Pet. 18-20) that the FRSA standards really will not protect worker safety because the purpose of the speed limit regulation is to protect against train derailments and not to prevent collisions with other vehicles. But this is precisely the same argument this Court rejected in *Easterwood*, 507 U.S. at 675. Similarly, his argument that the warning-device regulations were intended to establish "a minimum kind of grade crossing protection," (Pet. 19) and not to relieve the railroad of the duty to establish the proper level of protection for a particular crossing, was directly rejected in *Shanklin*, 120 S. Ct. at 1475-76. Moreover, neither of these arguments provides any reason for this Court's review on certiorari. At most they are issues the Secretary should consider. See *id.* at 1477 (Breyer, J., concurring).

CONCLUSION

The Court should deny the petition for a writ of certiorari.

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posed as whether FRSA superseded FELA, the holdings were clearly correct that FRSA's objectives should trump FELA's, given Congress' dominant purpose embodied in FRSA to ensure uniform safety standards.